Episode Number: Season 2 Episode 1
Episode Title: **Employer Policies After the Stericycle Decision**
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Guest Speaker: Sarah Niemiroski

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Daniel Schwartz: And welcome back to another season of From Lawyer to Employer, a Shipman Goodwin Employment Law podcast. I am Dan Schwartz, a partner at Shipman Goodwin, and I'll be your host for today. With me, I have my colleague, Sarah Niemiroski.

Sarah Niemiroski: Hi, Dan. I'm happy to be here today.

Daniel Schwartz: We're happy to have you, Sarah, and happy to bring with you another season of From Lawyer to Employer.

As we talk about various labor and employment issues that have happened and over the next season, we're going to be talking about a whole bevy of them that have come out over the last couple of months. Today, we're going to talk about a new decision from the National Labor Relations Board.

While you might think that this decision would only have an impact on those employers that have unions, it actually has more far-reaching impacts, because it changes the rule that had been in place for employers about what employer policies are legal and what may not be legal under the National Labor Relations Act. Sarah and I are going to discuss that here today.

Sarah, with all that being said, what was the holding of *Stericycle* that employers need to know here?

Sarah Niemiroski: Sure, *Stericycle* overturned the previous standard of *Boeing* and employed a new standard for evaluating employee policies. When you look at an employee policy now, the General Counsel will have to establish whether a challenge work rule has a reasonable tendency to chill employees from exercising their Section 7 rights.

Section 7 rights--they apply to people who are in unions and employees who aren't. These are rights, including, yes, the right to organize, but also to come together and talk about your workplace conditions. This can include something as simple as, "This office is really too cold."

And I feel like we need to raise the temperature to something more complicated, including workplace conditions during COVID 19.

Daniel Schwartz: We've seen National Labor Relations Board decisions go back and forth. What was the rule prior to *Stericycle* coming out as to employer policies?

Sarah Niemiroski: The old rule under *Boeing* was that employers should look at the policy and evaluate the nature and the extent of the impact on the employee's rights and evaluate whether there's any legitimate justification associated with that rule. So, it was more of a balancing test. You would look at it and you'd say, "Okay. Does this impact my employee's Section 7 rights? But, as an employer, do I have a real reason to have this rule in place?"

Daniel Schwartz: So it might be, for example, a sexual harassment prevention policy. Would it be fair to say that most of those policies employers are--were going to be able to uphold under the old National Labor Relations Board decisions?

Sarah Niemiroski: Yeah, I would agree with that. The old decision, *Boeing*, it also created kind of these categories for evaluating roles. So, you'd have category one rules, which were always lawful. If they got challenged before the National Labor Relations Board, they'd look at it and they'd say no, this is completely fine.

This would include something like restricting the use of cameras in the workplace, something like that. Then there were category two rules, which were, employee policies that were sometimes lawful, but they warranted scrutiny. The NLRB should come in and look at it and say, does this impact an employee's rights and is there a legitimate justification for it? And then there were other policies that would be always unlawful and could never be justified.

Daniel Schwartz: And those would be those types of policies that might restrict employees from organizing, for example, things that should seem on their face that they're illegal, and as it so happens, they are. All right. So, we had what the rule was. Now, it seems like we're not just in this balancing test, but the NLRB is giving us something different?

Sarah Niemiroski: Exactly. Now it's different in a number of ways. So first, a rule is presumptively unlawful if an employee could interpret it as limiting their rights. So, if an average employee comes and looks at this handbook policy and says, “It limits my rights under Section 7 to express concerns about the workplace on behalf of a group of employees,” then that is presumptively unlawful.

And it's also viewed from the perspective now of an individual who is economically dependent on the employer. So previously, it was viewed from the viewpoint of a reasonable person, a reasonable employee. Now, the NLRB has inserted into that standard that you need to be viewing it from someone who really is reliant on their employer for a paycheck and to live, so from that perspective, someone is inclined to interpret the rules, employee rules, the broadest possible effect.

Daniel Schwartz: That does seem like a big shift in the rule. I think I had mentioned this at the beginning--this doesn't just apply to employers that have unions, does it?

Sarah Niemiroski: No, it doesn't. It applies to any employer who has any employees. It doesn't matter if your workplace is unionized or not because all employees have rights under the NLRA.

Daniel Schwartz: Now, I presume this was a decision from the NLRB itself, right?

Sarah Niemiroski: Correct.

Daniel Schwartz: It's possible that the decision could get appealed to an appeals court that could review it. But for the time being, this is the decision that the agency has come out with, right?

Sarah Niemiroski: Absolutely. And I'd also like to add that there is a way for an employer to show that their policy is legitimate and justified, even if it could be reasonably interpreted as limiting an employee's rights.

Daniel Schwartz: How does an employer do that?

Sarah Niemiroski: So, the employer needs to show that the rule is narrowly tailored to legitimate and substantial business interests.

Daniel Schwartz: Do you have an example as to what that might be?

Sarah Niemiroski: This hasn't been interpreted yet by any of the lower ALJs, and you know the NLRB doesn't really opine on it. But what I would say that could be is, you work in a factory with hazardous material. You need to be in a bunny suit, a jumpsuit, and the employer prohibits the use of cell phones when you're on the factory floor in this jumpsuit. That is above and beyond related to legitimate and substantial business interests, which is the safety of your employees. You can't have employees on phones in this factory when you know they're supposed to be fully in safety gear.

Daniel Schwartz: All right, so I'm sure employers right now are listening, going "Do I have to do a full review of all of my policies? Are there some policies I should look at? What do we think? Are there types of policies that might be challenged more under this new rule?

Sarah Niemiroski: Sure, so there are some policies that will really deserve a close look, including, if you have a conflict of interest policy in your handbook, you won't retain an employee who engages in activity that adversely reflects on your company, something like that. That could be reasonably interpreted as, prohibiting an employee from engaging in section seven activity.

Daniel Schwartz: And I would think maybe something like a non-disparagement policy. Is that something else we're thinking about?

Sarah Niemiroski: Oh, completely. If an employee comes out and says, "My employer's COVID-19 policies or what have you adversely impact my safety" or something like that could be reasonably interpreted as disparaging the company. And an employee could hesitate in raising these concerns.

Daniel Schwartz: I would also think that a non-solicitation policy might also be the type of policy that would be subject to a challenge from the NLRB as well.

Sarah Niemiroski: I could completely see that as well.

Daniel Schwartz: Employers that are looking at this issue and trying to figure out how to make heads or tails, what are some of the things that employers should think about now going forward?

Sarah Niemiroski: Really employers should take a close look at their handbook from the perspective of an employee. Could an employee read this and reasonably say, "Oh, I can't talk about unionization. I can't talk about anything that adversely affects other employees." That's really the key is you

need to take a close look at your policies and when crafting future policies, take the same perspective.

Daniel Schwartz: A lot of times with employers under the old rule, I think some employers viewed the fact that they could put in a simple disclaimer, like nothing in this policy shall be read to interfere with the section 7 right. Is that type of disclaimer going to solve all the employer issues in this matter?

Sarah Niemiroski: A general disclaimer, at the front of your handbook buried in the introductory section, probably not. If you identify a specific policy like the harassment or retaliation policy previously discussed and you throw the disclaimer directly into that section and say nothing in this non-solicitation provision is meant to infringe on employees Section 7 rights, that could do it.

Daniel Schwartz: So, for employers who, again, both have unions and who don't have unions, it seems like the decision is going to apply equally to both of them, right?

Sarah Niemiroski: Yes.

Daniel Schwartz: All right. So the takeaways we have for employers are... One, understand the decision to review your policies to determine if they're going to withstand scrutiny under the decision. And then three would be, I think, consulting with your legal counsel to see, Hey, let's do a stress test here, are the revisions we want to make to these policies going to withstand scrutiny?

It seems like those are some important steps for employers to follow.

Sarah Niemiroski: I agree.

Daniel Schwartz: Do we expect anything more coming from this decision in the near future? Right now, we are living in this unknown world where we're going to see decisions coming out from administrative law judges.

Sarah Niemiroski: We will probably see decisions coming out from the ALJs interpreting employee handbooks and policies under *Stericycle*, and it's possible that we'll see a legal challenge all the way up into the circuit courts.

Daniel Schwartz: And maybe for our listeners, I think I'll preview. This isn't the only decision we've seen recently from the National Labor Relations Board. I think now that the board's composition has changed over the last couple of years. We're starting to see more and more of these decisions come into play. So

Stericycle is just one, I think, of the topics that we'll be discussing in the upcoming episodes.

So I wanted to preview that for you for the time being. This is the one that I think employers can take action on immediately. And so with that. Sarah, thanks so much for joining us on this episode.

Sarah Niemiroski: Thanks for having me, Dan. And thanks for listening to another episode of From Lawyer to Employer. See you again soon.

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